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SUPREME COURT, U.S.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1950

## No. 96

CANTON RAILROAD COMPANY, APPELLANT,

*vs.*

JOSEPH L. A. ROGAN, OWEN E. HITCHENS AND WILLIAM W. TRAVERS, CONSTITUTING STATE TAX COMMISSION OF MARYLAND

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

FILED MAY 29, 1950.

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1950

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CANTON RAILROAD COMPANY, APPELLANT,

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 17, 1950.

[fol. 1]

# IN THE COURT OF APPEALS OF MARYLAND
## OCTOBER TERM, 1949

No. 96

CANTON RAILROAD COMPANY

v.

JOSEPH H. A. ROGAN, OWEN E. HITCHENS and WILLIAM W. TRAVERS, Constituting the State Tax Commission of Maryland

PETITION FOR ALLOWANCE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable, Ogle Marbury, Chief Judge of the Court of Appeals of Maryland:

The Appellant, Canton Railroad Company, by its attorneys John Henry Lewin and Venable, Baetjer and Howard, alleges:

1. On April 19, 1950, the Court of Appeals of Maryland, being the highest court of the State of Maryland in which a decision in this case could be had, filed its opinion in this case and entered a decree against your Petitioner affirming the decree of the Circuit Court No. 2 of Baltimore City, which sustained a decision of the State Tax Commission of Maryland. This decree is final. On May 19, 1950, the time expired within which any petition for reargument could be filed, and the mandate of the Court of Appeals of Maryland issued to the said lower court.

[fol. 2] 2. Your Petitioner is a corporation of the State of Maryland engaged in the business of operating a railroad and marine terminal in said state, and a substantial part of its business consists of handling, transporting and forwarding in foreign commerce imports and exports, in return of which services it derives revenues or gross receipts. A statute of the State of Maryland, to wit, Article 81, Secs. 94½ and 95 of the Maryland Code (1943 Supp.) and Secs. 96-100 inclusive of the Maryland Code (1939 Edition) purports to, and has been construed and applied to, lay,

and exact from your Petitioner, an annual State franchise or privilege tax upon, and in return for, the right of your Petitioner to engage in such foreign commerce and in such importing and exporting process, measured by the gross receipts derived in the preceding calendar year by your Petitioner from the rendition of its services in handling, transporting and forwarding imports and exports.

3. In this case, in the proceedings before the State Tax Commission of Maryland, the lower court and this Court leading up to the entry of the final decree of the Court of Appeals of Maryland mentioned in paragraph 1 hereof, the validity of said statute of the State Maryland, as so construed and applied in the year 1947, was drawn in question on the ground of its being repugnant to the Constitution of the United States and in particular to Article 1, Section 10, Clause 2 thereof known as the Import-Export [fol. 3] Clause; and the decision of the Court of Appeals of Maryland in this case, embodied in its said final decree, was in favor of the validity of said statute.

4. Your Petitioner has filed with this petition with the Clerk of the Court of Appeals of Maryland an assignment of errors, setting out separately and particularly each error which your Petitioner asserts was made by the Court of Appeals of Maryland in this case and in its said decision and final decree, and also presents herewith a separate typewritten statement particularly disclosing the basis upon which your Petitioner contends that the Supreme Court of the United States has jurisdiction upon appeal to review the said final decree of the Court of Appeals of Maryland in question.

Wherefore, your Petitioner prays the allowance of an appeal from said final decree of the Court of Appeals of Maryland to the Supreme Court of the United States, to the end that the Supreme Court of the United States may review the record in this case and said final decree, and correct the said errors assigned and complained of by your Petitioner, and reverse the said final decree.

John Henry Lewin, Venable, Baetjer & Howard,
Attorneys for Petitioner.

[fol. 4] IN THE COURT OF APPEALS OF MARYLAND

[Title omitted]

ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Canton Railroad Company, the Appellant in this case, by its attorneys, having this day duly petitioned the Chief Judge of the Court of Appeals of Maryland for the allowance of an appeal to the Supreme Court of the United States from the final decree of the Court of Appeals of Maryland in this case entered April 19, 1950, (the time for filing a motion for reargument in this case having expired and the mandate of the Court of Appeals of Maryland having issued to the lower court on May 19, 1950), and having at the same time duly presented, and filed with the Clerk of this Court, its Petition for Allowance of Appeal, Assignment of Errors and Jurisdictional Statement, pursuant to statute and to the rules of the Supreme Court of the United States in such cases made and provided, and the said Appellant having given and filed, as security for costs of said appeal, a surety bond in the principal amount of Five Hundred [fol. 5] Dollars, which bond has this day been approved by the Chief Judge of the Court of Appeals of Maryland, it is this 24th day of May, 1950, by the Chief Judge of the Court of Appeals of Maryland,

Ordered that an appeal as provided by law be, and the same hereby is, allowed to the Supreme Court of the United States from the said final decree of the Court of Appeals of Maryland, and it is further ordered that the Clerk of the Court of Appeals of Maryland shall prepare and certify a transcript of the record, proceedings and final decree in this case and transmit the same to the Clerk of the Supreme Court of the United States.

Ogle Marbury, Chief Judge of the Court of Appeals of Maryland.

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[fols. 6-8] Bond on appeal for $500.00 approved May 24, 1950, omitted in printing.

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[fols. 9-10] Citation in usual form showing service on Hall Hammond, et al. omitted in printing.

[fol. 11] IN THE COURT OF APPEALS OF MARYLAND

[Title omitted]

ASSIGNMENT OF ERRORS

Canton Railroad Company hereby assigns the following errors in the record, decision and final decree of the Court of Appeals of Maryland in this case, on the basis of which it will pray the Supreme Court of the United States, on appeal, to reverse the said final decree of the Court of Appeals of Maryland:

1

The Court of Appeals of Maryland erred in deciding and decreeing that the statute of the State of Maryland, Article 81, Sections 94½ and 95 of the Maryland Code (1943 Supp.), construed and applied to impose a state franchise or privilege tax upon Canton Railroad Company's franchise or privilege "to operate a railroad", and to impose a part of said tax upon its privilege to engage in the business of handling, transporting and forwarding imports and exports in transit, is valid and not repugnant to Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause), insofar as said statute [fol. 12] imposes such tax upon Canton Railroad Company's privilege to engage in the importing and exporting process, (i.e. the business of handling, transporting and forwarding imports and exports in transit), and measures this tax by Canton Railroad Company's gross receipts from such business.

2

The Court of Appeals of Maryland erred in deciding and decreeing that the statute of the State of Maryland, Article 81, Sections 94½ and 95 of the Maryland Code (1943 Supp.), construed and applied to impose a state franchise or privilege tax upon the Canton Railroad Company's franchise or privilege "to operate a railroad", and to impose a part of said tax upon its privilege to engage in foreign commerce (i.e. handling, transporting and forwarding imports and exports in transit), is valid and not repugnant to Article 1, Section 8, Clause 3 of the Constitution of the United States (Commerce Clause), insofar as said statute imposes such tax upon Canton Railroad Company's privilege to engage

in foreign commerce, (i.e. the business of handling, transporting and forwarding imports and exports in transit), and measures this tax by Canton Railroad Company's gross receipts from such business.

3

The Court of Appeals of Maryland erred in deciding and decreeing that the statute of the State of Maryland, Article 81, Sections 94½ and 95 of the Maryland Code (1943 Supp.), insofar as it is construed and applied to impose a state franchise or privilege tax upon Canton Railroad [fol. 13] Company's privilege to engage in the business of handling, transporting and forwarding imports and exports in transit, measured by its gross receipts derived from such business, is valid and not repugnant to Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause), because it was imposed by the State of Maryland as an "in lieu franchise tax" in the place and stead of certain State ad valorem property taxes.

4

The Court of Appeals of Maryland erred in deciding and decreeing that the statute of the State of Maryland, Article 81 Sections 94½ and 95 of the Maryland Code (1943 Supp.), insofar as it is construed and applied to impose a state franchise or privilege tax upon Canton Railroad Company's privilege to engage in foreign commerce (i.e. the business of handling, transporting and forwarding imports and exports in transit), measured by its gross receipts derived from such business, is valid and not repugnant to Article 1, Section 8, Clause 3 of the Constitution of the United States (Commerce Clause), because it was imposed by the State of Maryland as an "in lieu franchise tax" in the place and stead of certain State ad valorem property taxes.

5

The Court of Appeals of Maryland erred in deciding and decreeing that, because the State of Maryland might validly and constitutionally impose certain non-discriminatory ad valorem property taxes upon the property of the Canton Railroad Company, it may, notwithstanding the provisions of Article 1, Section 10, Clause 2 of the Constitution [fol. 14] of the United States (Import-Export Clause),

validly and constitutionally impose, in lieu of such state ad valorem property taxes, and in the place and stead thereof, a state franchise or privilege tax upon Canton Railroad Company's privilege to engage in the importing and exporting process, (i.e. the business of handling, transporting and forwarding imports and exports in transit), and measure this tax by Canton Railroad Company's gross receipts from such business.

6

The Court of Appeals of Maryland erred in deciding and decreeing that, because the State of Maryland might validly and constitutionally impose certain non-discriminatory ad valorem property taxes upon the property of Canton Railroad Company, it may, notwithstanding the provisions of Article 1, Section 8, Clause 3 of the Constitution of the United States (Commerce Clause), validly and constitutionally impose, in lieu of such state ad valorem property taxes, and in the place and stead thereof, a state franchise or privilege tax upon Canton Railroad Company's privilege to engage in foreign commerce, (i.e. the business of handling, transporting and forwarding imports and exports in transit), and measure this tax by Canton Railroad Company's gross receipts from such business.

7

The Court of Appeals of Maryland erred in deciding and decreeing that a state "in lieu franchise tax", imposed by Article 81, Sections 94½ and 95 of Maryland Code (1943 [fol. 15] Supp.) upon Canton Railroad Company's privilege of engaging in foreign commerce and in the importing and exporting process (i.e. the business of handling, transporting and forwarding imports and exports in transit) is a constitutionally valid substitute for a non-discriminatory and valorem property tax which might validly and constitutionally be imposed upon the property of the Canton Railroad Company.

8

The Court of Appeals of Maryland erred in deciding and decreeing that, although Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause) forbids the imposition by the State of Maryland of "any" state tax upon the importing and exporting process,

and Article 1, Section 8, Clause 3 of the Constitution of the United States (Commerce Clause) forbids the imposition of any state tax which constitutes a discrimination against, or an unreasonable and undue burden upon, foreign commerce, and the Fourteenth Amendment of the Constitution of the United States forbids the deprivation of property without due process of law, and, although Canton Railroad Company is engaged in such importing and exporting process and in such foreign commerce, nevertheless the State of Maryland might, if it chose to do so, validly discriminate against such importing and exporting process and such foreign commerce, and against the property used therein, by levying upon the value of Canton Railroad Company's property used in such process, a state property tax at a rate over ten times greater than the rate of such property [fol. 16] taxes levied by the State upon the value of the property of all other taxpayers in the State of Maryland except those owning and operating railroads.

9

The Court of Appeals of Maryland erred in deciding and decreeing that the State of Maryland might, notwithstanding the Constitution of the United States, validly impose upon the value of the property of Canton Railroad Company used by it in the importing and exporting process and in foreign commerce a state property tax at a rate over ten times greater than the rate of such property taxes levied by the State of Maryland upon the value of the property of all other taxpayers in the State of Maryland except those owning and operating railroads; and then, upon this erroneous and unconstitutional premise, further erred in deciding and decreeing that therefore the State of Maryland may validly, in lieu of such discriminatory property tax, impose upon the Canton Railroad Company's privilege of engaging in the importing and exporting process and in foreign commerce a state franchise or privilege tax of the same magnitude.

10

The Court of Appeals of Maryland erred in deciding and decreeing that, because the State of Maryland might validly and constitutionally impose an ordinary non-discriminatory state ad valorem property tax upon the property of the Canton Railroad Company, it may, notwithstanding the

provisions of the Import-Export Clause and the Commerce [fol. 17] Clause of the Constitution of the United States, validly impose, by Article 81, Sections 94½ and 95 of the Maryland Code (1943 Supp.), in lieu of such property tax, or in the place and stead thereof, a state franchise or privilege tax upon Canton Railroad Company's privilege to engage in the importing and exporting process (i. e. the business of handling, transporting and forwarding imports and exports in transit), measured by Canton Railroad Company's gross receipts from such business, although the amount of said franchise or privilege tax is over ten times greater than a reasonable and just equivalent of such ordinary non-discriminatory state ad valorem property tax.

11

The Court of Appeals of Maryland erred in deciding and decreeing that a state "in lieu franchise tax", imposed by Article 81, Sections 94½ and 95 of the Maryland Code (1943 Supp.) upon Canton Railroad Company's privilege of engaging in foreign commerce and in the importing and exporting process (i. e. the business of handling, transporting and forwarding imports and exports in transit), which "in lieu franchise tax" is over ten times greater than an ordinary non-discriminatory state ad valorem property tax which might have been validly imposed by the State of Maryland upon the property of Canton Railroad Company, is a constitutionally valid substitute for such an ordinary non-discriminatory ad valorem property tax upon the property of the Canton Railroad Company.

[fol. 18]

12

The Court of Appeals of Maryland erred in deciding and decreeing that the decisions of the Supreme Court of the United States in the cases of *Maine* v. *Grand Trunk Railway*, 142 U. S. 217, *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335, *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450, *Northwestern Life Insurance Co.* v. *Wisconsin*, 247 U. S. 132, *Great Northern Railway Co.* v. *Minnesota*, 278 U. S. 503 and *Illinois Central Railroad Co.* v. *Minnesota*, 309 U. S. 157, held valid, under Article 1, Section 8, Clause 3 of the Constitution of the United States (Commerce Clause), "in lieu franchise taxes" imposed upon the privilege of engaging in

interstate commerce as valid substitutes for constitutionally valid ad valorem property taxes.

This is error, because the Minnesota state in lieu taxes held valid in the *U. S. Express Co.*, *Cudahy Packing Co.*, *Great Northern Railway Co.* and *Illinois Central Railway Co.* cases were themselves property taxes and not "in lieu franchise taxes"; because the Pennsylvania state tax held valid in *Maine* v. *Grand Trunk Railroad Co.* was construed to be a property tax in *Galveston, Harrisburg and San Antonio Railroad Co.* v. *Texas*, 210 U. S. 217; and because the "in lieu franchise tax" held valid in *Northwestern Life Insurance Co.* v. *Wisconsin* was imposed upon the privilege of engaging in the insurance business which was not then interstate commerce (Cf. *Paul* v. *Virginia*, 8 Wall. 168 with *U. S.* v. *Southeastern Underwriters Assn.*, 322 U. S. 533). Furthermore, unlike the in lieu franchise or privilege tax imposed upon Canton Railroad Company in the case at [fol. 19] bar, which is over ten times greater than ordinary state ad valorem property taxes, all of the state taxes held valid in these cases were no more than a reasonable and just equivalent of ordinary state ad valorem property taxes.

13

The Court of Appeals of Maryland erred in deciding and decreeing that "the tax here in question is not a direct tax on imports or exports like that of a State stamp tax upon bills of lading for the export of gold and silver; or a federal stamp tax on an export bill of lading for wheat exported * * *; or a federal stamp tax on charter parties exclusively for the carriage of cargoes from State ports to foreign countries; or a tax applied against contracts of marine insurance, which were held to be an integral part of exports."

This is error, because the invalid stamp taxes with which the Court of Appeals of Maryland in this holding attempts to contrast the franchise or privilege tax assailed in the case at bar were not property taxes imposed upon the exports themselves; on the contrary these stamp taxes were all excise or privilege taxes upon integral parts of exportation and, to that all-important extent, are closely similar to the Maryland state franchise tax upon importation and exportation here in question. The only differences between these invalid stamp taxes and the Maryland state franchise tax in question are that the latter (1) is imposed by a state and

[fol. 20] not by the federal government, (2) is a tax upon exportation itself, which is more inclusive than the integral parts of exportation, and (3) is a tax upon importation as well.

14

The Court of Appeals of Maryland erred in deciding and decreeing that the state franchise or privilege tax imposed by Article 81, Sections 94½ and 95 of the Maryland Code (1943 Supp.) upon Canton Railroad Company's privilege of engaging in the importing and exporting process (i. e. handling, transporting and forwarding exports and imports in transit) "is certainly not comparable under the Import-Export Clause to" the stamp tax or excise laid upon the privilege of entering into a contract of insurance insuring a cargo of exports held invalid in *Thames and Mersey Insurance Company* v. *U. S.*, 237 U. S. 19, or the sales tax levied expressly "for the privilege of selling" exported gasoline held invalid in *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69.

15

The Court of Appeals of Maryland erred in deciding and decreeing that the California state tax held invalid in *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, as repugnant to Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause), was "a direct tax upon an export".

[fol. 21] This is error, because, on the contrary, said tax was retail sales tax levied expressly "for the privilege of selling tangible personal property at retail" including exported gasoline.

16

The Court of Appeals of Maryland erred in deciding and decreeing that Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause) should not "be given a more prohibitive effect" upon state taxes than Article 1, Section 8, Clause 3 of the Constitution of the United States (Commerce Clause).

This is error, because the Import-Export Clause forbids "any" tax upon importation and exportation, whereas the Commerce Clause has been construed and applied to have a more limited effect and to forbid only certain state taxes upon interstate and foreign commerce.

17

The Court of Appeals of Maryland erred in deciding and decreeing that there is "no reason why a franchise tax measured by gross receipts, including receipts from foreign commerce, should be valid under one clause (Commerce Clause) and not under the other (Import-Export Clause), particularly where the tax is in lieu of other permitted taxes".

John Henry Lewin, Venable, Baetjer & Howard, Attorneys for Appellant, Canton Railroad Company.

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[fols. 22-43] In the Court of Appeals of Maryland

[Title omitted]

Appeal from the Circuit Court No. 2 of Baltimore City

Appendix to Appellant's Brief—Filed October 13, 1949

[fol. 44] In Circuit Court No. 2 of Baltimore City

Decree

This case coming on for hearing; counsel for the respective parties having been heard; briefs having been filed; and the proceedings having been read and considered; it is this 29th day of June, 1949, by the Circuit Court No. 2 of Baltimore City

Adjudged and Decreed

That the decision of the State Tax Commission of Maryland to include in the measurement of the Petitioner's Gross Receipts Tax for the year 1947, receipts derived from the transportation of goods consigned for importation or destined for exportation, be and the same is hereby sustained.

Joseph Sherbow.

IN THE CIRCUIT COURT NO. 2 OF BALTIMORE CITY

OPINION—Filed June 24, 1949

These appeals by the Western Maryland Railway Company and the Canton Railroad Company are based upon the contention set up by the taxpayers that the gross receipts tax assessed under the provisions of Code, Article 81, Sections 94½ to 99 (1943 Supplement), inclusive, are unconstitutional and invalid as applied to the operating revenues of the railroads derived from their import and export business.

This Code provision requires railroads and certain other public utilities to pay an annual tax "as a franchise tax * * * measured by the gross receipts for the preceding calendar year. * * * " Taxable gross receipts are limited to operating revenues derived from business in this State. The tax has been in effect since 1872, but has never been directly passed upon by the Supreme Court of the [fol. 45] United States. Our Court of Appeals has held that this tax does not violate the Commerce Clause of the Federal Constitution. (Railroads vs. State, 92 Md. 668, 1901.)

Now for the first time the question is raised as to whether the Import-Export Clause of the Constitution of the United States prevents the State of Maryland from levying this tax on the gross receipts earned by railroads in this State from transportation of exported and imported goods.

The amount of taxes involved in this controversy is considerable and will be high as long as export traffic remains at its present level. The methods of calculation are not before the court, although it is apparent the actual determination of export-import traffic is difficult, but not impossible, of ascertainment as the railroads keep complete detailed records of shipments.

The railroads filed their returns to the State Tax Commission in due course, but after several recent decisions of the U. S. Supreme Court they filed amended returns seeking to eliminate the gross receipts earned from the transportation of exported coal, grain and miscellaneous commodities, and of imported ores and other freight. The claim is based upon the Export-Import Clause, Article 1, Section 10, Clause 2, of the Constitution of the United States, the taxpayers asserting this clause prohibited such State taxation.

After lenghty hearings the State Tax Commission held the tax was not prohibited by this constitutional provision and these appeals followed.

The Export-Import Clause of the Constitution, Article I, Section 10, Clause 2, is as follows:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the [fol. 46] Revision and Control of the Congress."

This section of the Constitution is broad and all inclusive with only one exception not relevant here. It prohibits the State from levying any tax on exports or imports and from deriving any revenue from this source. This clause represented a compromise in the Constitutional Convention between those advocating local and those advocating national sovereignty. Its purpose was to end the strife that had characterized the Confederation. Southern States felt they would bear the brunt of imposts on imports if left to individual States for determination, while exporting States felt they would be at a tradin, disadvantage if other States taxed their products flowing through these States to foreign markets. By Article I, Section 9, of the Constitution, even Congress was placed under a disability to tax exports for fear of discrimination. Congress was given the power to regulate interstate and foreign commerce, but the power to tax exports was taken from the States to prevent coastal States from taxing goods produced inland and sold abroad. (The Federalist, No. 42; Elliot's Debates, 252, 483; 14 U. of C. Law Review, 672.)

Over the years various cases came to the Supreme Court for determination as to whether the different taxes imposed from time to time violated this provision of the Constitution.

These cases range all the way from taxes on foreign bills of lading to taxes upon baseball equipment for foreign shipment. These cases are collected in various law review articles, where they are summarized, and are not repeated here. (See 14 University of Chicago Law Review, 669;

42 Illinois Law Review, 251; 59 Harvard Law Review, 627; 60 Harvard Law Review, 501 and 710.)

Then came the cases of Richfield Oil Corporation vs. State Board of Equalization (1946), 329 U. S. 69, and a short time later Joseph vs. Carter and Weeks Stevedoring Co. (1947), 330 U. S. 422.

[fol. 47] The Richfield Oil case involved the validity of the California Retail Sales Tax as applied to the sale of oil for export. Under the California Law it was the duty of the vendor, Richfield Oil, to collect the tax from the vendee. In this instance the purchaser was the New Zealand Government. The oil was carried by pipe line from the refinery to storage tanks at the harbor, and then pumped into the hold of the steamer for shipment abroad.

The Supreme Court held that the Import-Export Clause prohibited the imposition of this State tax on this sale, with the opinion by Mr. Justice Douglas, six Justices concurring, and Mr. Justice Black dissenting. The opinion discusses the Import-Export Clause at some length and pointed out that "any" tax, whether discriminatory or not, is prohibited by the Export-Import Clause. There are no qualifications, and only one minor exception.

In applying this provision of the Constitution to the facts in that case the Supreme Court found that when the oil was delivered into the hold of the vessel "that delivery marked the commencement of the movement of the oil abroad." The process of exporting within the meaning of the Constitution began when the goods actually started their movement in foreign commerce, and then the immunity attaches.

The Joseph case, supra, involved the validity of the New York City gross receipts tax as applied to gross receipts derived from stevedoring. By a five to four decision the Supreme Court held the tax invalid under the commerce clause, but Mr. Justice Douglas (who wrotes the opinion in the Richfield case) dissented, taking the view that the tax did not violate the commerce clause but did violate the Import-Export Clause. The majority did not base their decision on the Import-Export Clause of the Constitution.

In the case of Joy Oil Co. vs. State Tax Commission, decided June 13, 1949, by the Supreme Court, 17 U. S. Law Week, 4508, Mr. Justice Frankfurter, speaking for the majority of the Court, held that a million and a half

[fol. 48] gallons of gasoline, marked for export, but held in Michigan for fifteen months awaiting adequate transportation facilities, was subject to an *ad valorem* property tax assessed by the City of Dearborn. The Court said, it was not enough "that by the rail shipment to Detroit one step in the process of exportation had been taken * * *. The Export-Import Clause was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services."

While it is true the Supreme Court, in Mr. Justice Douglas' opinion in Empresa Siderurgica, S. A. vs. County of Merced, decided May 31, 1949, 17 U. S. Law Week, 4431, held that "the tax immunity runs to the process of exportation and the transactions and documents embraced in it," it is equally true the Court was again passing on the direct tax on the article itself.

The taxpayers urge that Hooven & Allison vs. Evatt, 324 U. S. 652 (1945) is authority for holding that the importing process continues through the rail journey to an inland destination. The Court there held that the hemp in Ohio, ready for use in manufacture, still in its unbroken package, remained an import after the railroad journey was over. Again the Court was dealing with a tax on the article itself.

It is thus seen that the question presented in the Richfield Oil case, Joy Oil Co. case, the Empresa Siderurgica, case and the Hooven and Allison case, involved a tax on the articles themselves because those articles had obtained or retained the characteristics of exports or imports. But that is not the question in this case. Here the issue is whether the Maryland Gross Receipts Tax, as applied to the railroads involved, is a tax on the activity or process of exporting and importing.

In Crew-Levick Co. vs. Pennsylvania, 245 U. S. 292 (1917), the Supreme Court held invalid a gross receipts tax levied against a taxpayer who was actually selling exports. That case established the rule that a gross receipts tax imposed upon the business of selling goods in foreign commerce was, in effect, "a regulation of foreign commerce of [fol. 49] an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution." But the Crew-Levick case did not decide that every non-discriminatory gross receipts tax imposed upon, or which might influ-

ence, the export business was invalid, nor did it define, for all purposes, the scope of activities which might be embraced within the concept of the "export business."

It seems obvious that the railroads here involved are not engaged in the exporting or importing business. These carriers do not control the shipments of the products other than to bring them, in certain cases, to the water's edge. Here, unlike the taxpayer in the Crew-Levick case, the railroads are not concerned directly with foreign markets and foreign buyers. While it may be true that the railroads, in part, make possible that other persons may engage in the export-import business, such assistance does not convert the carriers into exporters or importers themselves.

Taking the contention of the railroads in its most favorable light, therefore, it can be seen that they seek to have held invalid the Maryland Gross Receipts Tax because it is imposed not upon the business or process of importing and exporting but upon an activity which merely assists other persons to engage in that business. No Supreme Court case has gone this far, and, in my opinion, the contention is without merit.

The Court holds that the Maryland Gross Receipts Tax is too remote and indirect to be affected by the Export-Import Clause. Goods are in transit on these railroads at all times, but are not in the process of exportation until delivered to the ultimate carrier for shipment abroad. The State tax is not a tax on exports or imports or on the business or process of exporting or importing, but is a tax on the privilege of operating a railroad in the State of Maryland, and is in lieu of certain other taxes. (See State Tax Commission vs. Western Md. Ry., 52 A. 2d, 615.) The tax is not levied on the goods exported or imported, or the proceeds, or the privilege of exporting or importing.

[fol. 50] All transportation in some manner affects to some degree exports and imports. The real question is, how much and how direct, and whether there is a close and substantial relationship to exports and imports as to come within the prohibition of the Constitution.

There must at some point be a distinction between the direct and indirect effects of any tax. We must determine what its limit is and what its practical application amounts to.

This clause does not reach all enterprises and transactions which have a remote and indirect effect on exports and

imports, otherwise it would embrace every kind of tax. The income tax paid by a railroad in some measure affects exports and imports and is based in some degree on the profits from such traffic. Other taxes paid by railroads of necessity affects exports and imports, but such affect is indirect and remote.

These railroads do not engage in foreign commerce, nor do they control the shipments of the products other than to bring them to other carriers for export or to receive them from other carriers for further transportation inland. To hold that they are engaged in exporting and importing because the merchandise is ultimately actually shipped abroad or received from foreign countries is another way of saying that that which was indirect has become direct.

It appears to me that the Maryland tax is not on the business of importing or exporting and is so remote insofar as its affect on exports and imports or the process of exporting or importing as not to be in contravention of the constitutional clause already mentioned.

The decision of the State Tax Commission in each case is sustained.

Joseph Sherbow, Judge.

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[fol. 51] STATEMENT OF THE CASE UNDER RULE 22

Pursuant to, and in conformity with, Rule 22 of the Rules and Regulations Respecting Appeals made and prescribed by the Court of Appeals of Maryland, the parties to this case, with the approval of the Circuit Court No. 2 of Baltimore City, have prepared and signed this Statement of the Case showing how the questions in this case arose and were decided:

1. Canton Railroad Company, hereinafter referred to as "Canton," is a railroad corporation incorporated under and by virtue of the laws of the State of Maryland with its place of business in Baltimore, Maryland. It is engaged in Maryland in the business of a common carrier and handler of freight only, and all of its piers, track and other railroad properties and facilities are located in the City of Baltimore, Maryland, and in Baltimore County where all of its business is conducted.

2. Pursuant to Maryland Code, Article 81, Section 96, Canton duly and timely filed in 1947 with the State Tax Commission of Maryland, hereinafter referred to as "Commission," its Report under oath, showing, as derived from its railroad business done in the State of Maryland during the year ended December 31, 1946, total gross receipts or operating revenues of $1,588,774.48 and claiming thereon that certain of said receipts and operating revenues were exempt from taxation under Maryland Code, Article 81, Section 95, because they were derived from Canton's operations in foreign commerce; and thereafter, in June, 1947, Canton duly filed with the Commission, which was received by the Commission as part of Canton's original Report, a verified Supplemental Report for the year ended December 31, 1946, which reported that, of its said total gross receipts or operating revenues, its gross receipts or operating revenues derived from its export and import operations in foreign commerce were as follows:

[fol. 52]

| I. C. C. Accounts | Operating Revenues from Foreign Commerce |
|---|---|
| 110 Switching | $565,713.30 |
| 135 Storage-Freight | 62,663.63 |
| 143 Crane Privilege | 57,122.24 |
| 143 Wharfage | 17,348.09 |
| 143 Weighing | 3,109.95 |
| Total | $705,957.21 |

In its letter to the Commission dated June 26, 1947, transmitting the said Supplemental Report, Canton claimed that the Maryland statute, Maryland Code Article 81, Section 95, imposing the gross receipts tax could not, under the Import-Export Clause of the Constitution of the United States, Article I. Section 10, Clause 2, be constitutionally applied to its said gross receipts derived from Canton's services in foreign commerce.

3. By letter to the Commission dated September 16, 1947, the attorney for Canton claimed that the said Maryland Statute imposing the gross receipts tax could not, under the said Import-Export Clause of the Constitution of the United States, be constitutionally applied to Canton's said

gross receipts or operating revenues from its export and import business and operations and referred the Commission to certain court decisions and other authorities.

4. By written notice dated December 18, 1947, the Commission notified Canton that a tentative assessment under Maryland Code Article 81, Section 95, amounting to $1,588,774.48 had been entered by the Commission against Canton, and that $1,588,774.48 was the amount of gross receipts in 1946 upon which the Commission had tentatively computed and imposed upon Canton a gross receipts tax for the year 1947 in the amount of $39,092.34, and that the said tentative assessment would become final and conclusive unless written application for a change therein should [fol. 53] be presented to the Commission within fifteen (15) days from the date of said notice.

5. By its letter to the Commission dated December 31, 1947, Canton duly applied to the Commission for a reduction of the said tentative assessment in an amount equal to its gross receipts and operating revenues derived from its import and export business and operations in foreign commerce, as disclosed separately by its said Supplemental Report. The exemption of such gross receipts and operating revenues would, if recognized, have reduced the said assessment by $705,957.21 to an assessment of $582,817.27 and the said proposed gross receipts tax by $17,648.34 to a tax of $21,444.00. In said letter Canton again claimed that the tentative assessment, insofar as it included such gross receipts and operating revenues, and that a gross receipts tax calculated on an assessment which included such gross receipts and operating revenues, would contravene the said Import-Export Clause of the Constitution of the United States.

6. On February 4, 1948, and February 26, 1948, a formal hearing on Canton's said protest and application for a change and reduction in said tentative assessment was held by and before the Commission, at which hearing Canton appeared and was represented by counsel. At said hearing all of the documents heretofore mentioned were offered and received in evidence and oral testimony and evidence was given by two witnesses on behalf of Canton as hereinafter set forth. No other testimony was offered by any party to the proceedings.

Melvin A. Myers, an experienced railroad accountant and Traffic Manager of Canton in charge of traffic, tariffs, rates, etc., and agents accounts, was duly sworn and testified that he had accurately prepared the said Report and Supplemental Report described in paragraph 2 hereof from accurate original records of Canton currently kept by it in the ordinary course of its business (which original records were then exhibited to the Commission); that he had direct supervision over the operations of Canton in 1946 [fol. 54] from which were derived the gross receipts or operating revenues set forth on the said Supplemental Report from Switching or transportation on Canton's line; that all of the gross receipts or operating revenues totaling $705,957.21 set forth by items on the said Supplemental Report as Operating Revenues From Foreign Commerce were derived from Canton's export and import business and operations in return for Canton's services in handling shipments then known by Canton to be then in actual transit to and from foreign countries; and that the principal commodities so handled by Canton in 1946 were ores, wood pulp and sugar, said three commodities being the subject of over ninety per cent of Canton's said import business.

Milton Shreck, Vice-President of Canton, was duly sworn and testified that he had held that office during 1946 and had direct supervision over the operations of Canton in 1946 from which were derived the gross receipts or operating revenues set forth in said Supplemental Report from the items Storage, Crane Privilege, Wharfage and Weighing. Canton pays ad valorem property taxes to local county and city governments only, being exempt by statute from the payment of such taxes to the State of Maryland. Canton also pays the State of Maryland a tax upon its net income in the calculation of which its operating revenues subject to the gross receipts tax less related expenses are excluded. This witness testified to the accuracy and correctness of the facts appearing upon the said Supplemental Report. He identified and verified an exhibit, which he had prepared, showing for each of four years, 1944 to 1947, inclusive, a comparison of the gross receipts taxes sought to be imposed on Canton and such taxes computed after eliminating from the assessments and tentative assessment the gross receipts or operating revenues claimed by Canton to be exempt by reason of the Import-Export

Clause with what a Maryland State Ad Valorem Property Tax would be for each of said years if computed at the current rate upon the assessed value of the properties of Canton and showing the ad valorem property tax rate which [fol. 55] would be needed to make such property taxes for each said year equivalent to the said gross receipts taxes. Said exhibit entitled "Canton Railroad Company—Comparison of Gross Receipts Taxes to State Ad Valorem Taxes" was offered and received in evidence and marked "Canton Railroad Company Exhibit No. 1". It is as follows:

EXHIBIT No. 1

Canton Railroad Company

Comparison of Gross Receipts Taxes to State Ad Valorem Taxes

| | State Property Taxes | | | Gross Receipts Taxes | | |
|---|---|---|---|---|---|---|
| Year | Assessed Value | Ad Valorem Rate | Amount | Amount of Tax (c) | Equivalent Ad Valorem Rate | Ratio of Col. (5) to Col. (2) |
| | (1) | (2) | (3) | (4) | (5) | (6) |
| 1944..... | $3,791,550 | .12 | $4,550 | (a) $60,093 | $1.58 | 13.2 |
| | | | | (b) 33,280 | .88 | 7.3 |
| 1945..... | 3,850,000 | .12 | 4,620 | (a) 58,609 | 1.52 | 12.7 |
| | | | | (b) 30,258 | .79 | 6.6 |
| 1946..... | 3,800,000 | .10 | 3,800 | (a) 48,772 | 1.28 | 12.8 |
| | | | | (b) 21,237 | .56 | 5.6 |
| 1947..... | 3,800,000 | .10 | 3,800 | (a) 39,092 | 1.03 | 10.3 |
| | | | | (b) 21,444 | .56 | 5.6 |

Notes:
(a) Based on Bax Commission Assessment.
(b) Amount of taxes with earnings from import-export traffic excluded.
(c) Measured by gross receipts for preceding calendar year.

* * * * * * *

This witness also identified and verified an exhibit which he had prepared, showing a breakdown of property tax assessments as between land and properties other than land made by the Commission on the properties of Canton for each of the four years, 1944 to 1947, inclusive. Said exhibit entitled "Canton Railroad Company—Breakdown of Property Tax Assessment" was offered and received in evidence marked "Canton Railroad Company Exhibit No. 2". It is as follows:

[fol. 56] EXHIBIT No. 2

Canton Railroad Company

Breakdown of Property Tax Assessment

| Year | Land | Other Than Land | Total |
|---|---|---|---|
| 1944 | $1,946,900 | $1,844,650 | $3,791,550 |
| 1945 | 1,953,750 | 1,896,250 | 3,850,000 |
| 1946 | 1,955,890 | 1,844,110 | 3,800,000 |
| 1947 | 1,955,890 | 1,844,110 | 3,800,000 |

* * * * * * *

This witness testified, from said Exhibits Nos. 1 and 2, that a State Property Ad Valorem tax rate 20.1 times the prevailing Ad Valorem rate would have to be imposed upon Canton's properties other than land in order to derive a property tax equal to the gross receipts tax for 1947 sought to be imposed by the Commission and ten and one-half times the prevailing Ad Valorem rate in order to derive a property tax equal to the gross receipts tax for the year 1947 calculated after eliminating from the tentative assessment for 1947 the gross receipts or operating revenues derived in 1946 and claimed by Canton to be exempt by reason of the Import-Export Clause.

This witness also testified that of Canton's gross receipts or operating revenues had been included as gross income in the computation of Canton's Maryland State Income Taxes for 1947, its said State Income Taxes for 1947 based on its net income derived in 1946, would have amounted to approximately $6,155.00.

The Chairman of the Commission, who presided at said hearing, stated:

> "The Commission feels satisfied with the figures and the manner in which they were arrived at.
>
> * * * * * * *
>
> "Now, the Commission accepts, as it usually does the breakdown of the figures by the officers of the Canton Railroad Company."

[fol. 57] 7. Typical of the switching, storage of freight, crane privilege, weighing and wharfage services rendered

by Canton in 1946, in return for which it derived the gross receipts or operating revenues shown in its said Supplemental Report, from its import and export business, are the following services actually rendered by Canton in connection with the following specific 1946 shipments:

## Import No. 1

In July of 1946, 1481 bales of woodpulp, weight 633,412 pounds, consigned by Borregaard & Company, importers to E. I. DuPont DeNemours & Company, Richmond, Virginia, were shipped from Sweden aboard the S. S. Kanangoora.

On July 9, 1946 the S. S. Kanangoora docked at a pier of Canton at Baltimore, Maryland, where the ship was unloaded by stevedores into railroad freight cars. Canton allowed the consignee fifteen days free storage.

Pursuant to shipping instructions from William H. Masson, agent of Borregaard & Company, received by Canton on July 12, 1946, Canton transported the 1481 bales or 633,412 pounds of woodpulp to E. I. DuPont DeNemours & Company, as follows:

| Car Initial and No. | Destination | Date Shipped (1946) | No. Bales | Weight |
|---|---|---|---|---|
| CNW 147192 | Amphthill Siding, Richmond, Va. | 7/12 | 164 | 70,142 |
| GN 45642 | Allegheny Warehouse A, Richmond, Va. | 7/12 | 188 | 80,406 |
| SLSF 162555 | Allegheny Warehouse A, Richmond, Va. | 7/12 | 188 | 80,406 |
| PRR 121996 | Allegheny Warehouse A, Richmond, Va. | 7/12 | 188 | 80,406 |
| GN 45127 | Allegheny Warehouse A, Richmond, Va. | 7/13 | 188 | 80,406 |
| PRR 54972 | Allegheny Warehouse A, Richmond, Va. | 7/15 | 189 | 80,834 |
| HP 28880 | Allegheny Warehouse A, Richmond, Va. | 7/15 | 188 | 80,406 |
| ACL 51459 | Allegheny Warehouse A, Richmond, Va. | 7/15 | 188 | 80,406 |
| | | | 1,481 | 633,412 |

[fol. 58] Canton on said dates switched the above cars to its connection in Baltimore with the line of the Pennsylvania Railroad, for which Canton made a charge of 37¢ per net ton, the charge being paid to Canton by the Pennsylvania Railroad Co. Canton received its payment from the Pennsylvania Railroad on the basis of a monthly statement of account submitted by Canton to the Pennsylvania Railroad.

Canton's gross receipts for its said services in forwarding the said import of woodpulp were $117.18 (37¢ per net ton x 633,412 lbs.) for switching.

* * * * * * *

Import No. 2

In March of 1946, 31,000 one-hundred pound bags of sugar, consigned to various companies in the United States by Golodetz and Company of New York, were shipped from Cuba abroad the S. S. Corinto via the Canton Docks in Baltimore, Maryland. The shipment arrived at Canton's Pier No. 4 in Baltimore on March 19, 1946 and was forwarded by Canton according to instructions received from Golodetz and Company or its representatives.

Typical of the handling by Canton of the said shipments are the following dispositions:

(a) On March 20, 1946, Canton received hauling order No. 3360 from the Stickwell Sales Company, Baltimore, which made the sale for Golodetz & Company, directing Canton to deliver 170 bags of said sugar to the purchaser thereof, Wm. J. B. Shanks Company, Baltimore, delivery to be taken by the buyer's truck at Canton's Pier No. 4. Pursuant to this order, Canton, on March 20, 1946, delivered to the buyer's truck, license Md. 231-303, 170 bags of said sugar.

In connection with this delivery Canton furnished top wharfage for which service it made a charge of 2¾¢ per 100 pounds or $4.70 (2¾¢ per 100 lbs. x 17,085 lbs.) A bill [fol. 59] for this amount was submitted by Canton on March 27, 1946 to Golodetz & Company and paid shortly thereafter.

(b) On March 20, 1946, Canton received hauling order No. 3679 from the Stickwell Sales Company, Baltimore, which made the sale for Golodetz & Company, directing Canton to deliver 300 bags of sugar to the purchaser thereof, Seven-Up Company, Washington, D. C., delivery to be taken by the buyer's truck at Canton's Pier No. 4. Pursuant to this order Canton shortly thereafter, delivered to buyer's truck, license D. C.-DT-193, 300 bags of said sugar. In connection with this delivery Canton furnished top wharfage and for such service billed Golodetz & Company for the amount of $8.29 (2¾¢ per 100 lbs. x 30,150 lbs.) on March 27, 1946 which was paid shortly thereafter.

(c) On March 28, 1946, Canton received shipping instructions from William H. Masson, agent of Golodetz & Company directing Canton to ship 1180 bags of said sugar to Geeman Bakeries, Cleveland, Ohio. Canton forwarded the same on March 29, 1946, via CRR-PRR on car NYC No. 161067. For its switching services Canton imposed a charge of 33¢ a net ton or $19.57 (118,590 lbs. x 33¢ a net ton) which was paid by the Pennsylvania Railroad Co.

(d) On March 25, 1946, Canton received shipping instructions from William H. Masson, agent of Golodetz & Company, directing Canton to ship 1000 bags of said sugar to the Hershey Chocolate Corporation, Hershey, Pennsylvania. Canton forwarded the same on March 29, 1946, via CRR-PRR-Reading on car Milw. No. 715048. For its switching services Canton imposed a charge of 33¢ a net ton or $16.58 (100,500 lbs. x 33¢ per net ton) which was paid by The Pennsylvania Railroad Company.

. . . . . .

[fol. 60] Import No. 3

In connection with the said shipment of sugar from Cuba to the United States via Canton, Baltimore, Maryland, which was unloaded at Canton Docks by the S. S. Corinto and consigned by Golodetz & Company to various companies in the United States, Canton allowed Golodetz & Company, consignor, 5 days free storage. At the expiration of 5 days all remaining sugar was subject to a storage charge of 5½¢ per 100 lbs. per month.

325,643 pounds or 3,292 bags of sugar, along with 2,292 pounds of sweepings, were left in the custody of Canton in excess of the five-day period awaiting forwarding instructions as hereinbefore described. For the storage of this sugar Canton imposed a charge of $180.36 at the above rate. Canton billed Golodetz & Company in this amount on March 30, 1946, and received payment shortly thereafter.

. . . . . .

Import No. 4

In August of 1946, 12,006,520 pounds of Russian chrome ore, consigned by the R. F. C. Office of Metals Reserve to the Treasury Department, Procurement Division, Seneca Ordinance Depot, Kendaia, New York, were shipped from

Russia aboard the S. S. Kamenetz Podolsk. On August 24, 1946, the S. S. Kamenetz Podolsk docked at the pier of the Canton Railroad Company. Pursuant to directions from the traffic manager of the R. F. C. Office of Metals Reserve, The Cottman Company unloaded the ship by means of a crane. The crane used was the property of the Canton Railroad Company but was operated by The Cottman Company, the latter paying the former 7½¢ a long ton for all goods unloaded by means of the crane.

3,892,320 pounds were unloaded by means of the crane; the residue was unloaded by other means not furnished by Canton. Canton's receipts for crane privileges were [fol. 61] $130.32 (7½¢ per long ton x 3,892,320 lbs.). Canton also furnished switching services in connection with this shipment. A total of 99 carloads of ore were switched at the rate of 37¢ a net ton or $2,221.21 (37¢ net ton x 12,006,520 lbs.

According to directions from the traffic manager of R. F. C. Office of Metals Reserve, these cars were shipped out by Canton between August 24 and August 28, 1946, to the Treasury Department, Procurement Division, Seneca Ordnance Depot, Kendaia, New York, via CRR, WMD, RDG, LV. Canton was paid for its switching by the Western Maryland Railroad Co.

* * * * * * *

Import No. 5

In July of 1946, 12,176,040 pounds of South African manganese ore, consigned by the Isthmian Steamship Company to the Carnegie Illinois Steel Corporation, Isabella Furnaces, Etna, Pennsylvania, were shipped from Durban, South Africa, aboard the S. S. Carrier Pigeon. On August 7, 1946, the S.S. Carrier Pigeon docked at Cottman's Crane Pier, Baltimore.

According to directions received from the Isthmian Steamship Company on August 2, 1946, the Cottman Company unloaded 7,246,440 pounds of ore by means of a crane owned by Canton. The residue of the cargo, 4,929,600 pounds, was unloaded by other means not furnished by Canton. Canton received $242.63 (7½¢ per long ton x 7,246,440 pounds) for the use of its crane from the Cottman Company.

The entire cargo of ore, 12,176,040 pounds was loaded into 87 cars and shipped out between August 7, 1946, and August 14, 1946, and consigned in bond by Canton to the Carnegie Illinois Steel Corporation, Isabella Furnaces, Etna, Pennsylvania, c/o Collector of Customs via CRR-PRR. Canton switched these 87 cars for which service it was paid by the Pennsylvania Railroad Co. 37¢ a net ton.

* * * * * * *

Import No. 6

[fol. 62] In August of 1946, 6,501,780 pounds of Indian manganese ore, consigned by the Bethlehem Steel Company to the Bethlehem Steel Company, Johnstown, Pennsylvania, were shipped from Vizagapata, India, aboard the S. S. Malancha. On August 25, 1946, the S. S. Malancha docked at the Canton terminals.

According to instructions from the F. H. Shallus Company, Baltimore, forwarding agents, the ship was unloaded by means of Canton's crane, operated by the Cottman Company and other means not furnished by Canton. 1,774,160 pounds of ore were unloaded by crane for which Canton received $59.40 (7½¢ per long ton x 1,774,160 pounds) from the Cottman Company.

The entire cargo of ore 6,501,780 pounds, was loaded into 54 cars and shipped out between August 25, 1946 and August 29, 1946, forwarded, pursuant to instructions, to the Bethlehem Steel Company, Johnstown, Pennsylvania, and routed via CRR-B&O-C&BL. Canton switched these 54 cars for which service it was paid by the B&O 37¢ a net ton.

* * * * * * *

Import No. 7

In January of 1946, the S. S. Joseph W. Hallister sailed from Europe with a cargo of 3,393,600 pounds of sand ballast consigned to the U. S. War Shipping Administration. This ship docked at Canton's pier and was unloaded on January 19, 1946 pursuant to directions from the U. S. War Shipping Administration. The unloading was done by means of a crane owned by Canton and operated by the Cottman Company. The sand was placed directly into lighters, and thus Canton furnished no other service in connection with this shipment. However Canton did not

impose its usual charge of 6½¢ per net ton unloaded for the privilege of side wharfage.

On February 28, 1946 Canton billed the U. S. War Shipping Administration in the amount of $110.31 (6½¢ per [fol. 63] net ton or fraction thereof x 3,393,600 pounds) for the side wharfage facilities furnished.

* * * * * * *

Import No. 8

Between February 11 and February 14, 1946, the S. S. Llandaff discharged at a pier of the Canton Railroad Company 67 carloads of Brazilian metallurgical grade manganese ore, shipped from Brazil, and consigned to the R. F. C. Office of Metals Reserve. These cars were switched by Canton to Canton's storage facilities, there unloaded and the ore stored.

Of the 67 cars filled with the cargo of ore, 5 carloads were composed of ore which could not be unloaded by means of a crane and thus could not be weighed by the crane scale as is the usual procedure. This fact necessitated a later weighing by Canton of these 5 cars, which service Canton furnished at the rate of 10¢ a gross ton weighed. For weighing these cars, Canton billed the R. F. C. Office of Metals Reserve in the amount of $31.65 (10¢ per gross ton x 316.48 gross tons) on February 28, 1946.

* * * * * * *

Export No. 1

On August 1, 1946, the Carnegie Illinois Steel Corporation, Irvin Works, Irvin, Pennsylvania, shipped on the Pennsylvania Railroad Co. on car PRR No. 840399 under waybill No. 914251 from Pittsburgh, 33 metal packages or 2,451 sheets of black sheet steel to the Canton Docks, Baltimore, Maryland, consigned to the United States Steel Export Company, Baltimore, for export to South Africa, the original way bill being so endorsed. Upon arrival of the car at Baltimore, Canton performed its customary forwarding switching services from its connection with the line of The Pennsylvania Railroad in Baltimore to Canton's [fol. 64] pier and charged for this service at the rate of 37¢ a net ton or $23.12 (37¢ a net ton x 125,035 lbs.) which charge was paid to Canton by The Pennsylvania Railroad

Co., Canton receiving payment on the basis of a monthly statement of account submitted to The Pennsylvania Co. by Canton.

The shipment was taken aboard the S. S. Robin Tuxford at Canton's pier in Baltimore and the said ship sailed from said pier for South Africa on August 7, 1946.

* * * * * * *

Export No. 2

On July 22, 1946, the Carnegie Illinois Steel Corporation shipped from Vandergrift, Pennsylvania on The Pennsylvania Railroad on car CN 427898 under way bill No. 7634, 276 bundles of black sheet steel to the Canton Docks, Baltimore, consigned to the United States Steel Export Company, Baltimore, for export to South Africa, the said original way bill being so endorsed. Upon arrival of this car in Baltimore, Canton performed its usual switching services from its connection with The Pennsylvania Railroad in Baltimore to Canton's pier and charged for this service at the rate of 37¢ a net ton or $11.36 (37¢ per net ton x 61,387 lbs.) which charge was paid to Canton by The Pennsylvania Railroad Company, Canton receiving payment on the basis of a monthly account submitted to The Pennsylvania Railroad by Canton.

This shipment was taken aboard the S. S. Robin Tuxford at Canton's pier in Baltimore and the said ship sailed for South Africa on August 7, 1946.

* * * * * * *

8. After the close of the hearing and the submission of the case for the decision of the Commission, the Commission on March 24, 1948 passed an order that Canton's "gross receipts tax" for the year 1947 as assessed is "constitutional" and its "protest is disallowed"; in view of this ruling on the law, that none of Canton's gross receipts [fol. 65] from its export and import business are exempt, the Commission neither approved nor rejected the amount of Canton's gross receipts claimed to be exempt from taxation under the Import-Export Clause of the United States Constitution, nor did it approve or reject the method by which such gross receipts were computed. The Commission admits, however, that the amount of tax involved

in this appeal is substantial although undetermined. By written notice dated March 24, 1948, the Commission notified Canton that a final assessment under Maryland Code, Article 81, Section 95 amounting to $1,588,774.48 had been entered by the Commission against Canton and that $1,588,744.48 was the amount of gross receipts in 1946 upon which th eCommission had finally computed and imposed upon Canton a gross receipts tax for 1947 in the amount of $39,092.34, and that, should Canton desire to further challenge the amount or validity of the assessment, it had the right under the law to appeal to the courts within thirty (30) days from the date of said notice.

9. An April 19, 1948, Canton filed in the Circuit Court No. 2 of Baltimore City a Petition of Appeal from said order and final assessment of the Commission. In said Petition, Canton alleged that the assessment appealed from included 1946 operating revenues (in the amount of $705,957.21) from Canton's import and export business, $565,713.30 thereof having been derived from switching, $62,663.63 thereof having been derived from storage, $57,122.24 having been derived from crane privilege, $17,348.09 thereof having been derived from wharfage, and $3,109.95 having been derived from weighing; that the Commission had erred in not holding as a matter of law that the inclusion of said operating revenues from Canton's 1946 import and export business in the measure of this 1947 franchise tax imposed upon it under Maryland Code, Article 81 Section 95; contravened the Import-Export Clause of the United States Constitution (Article 1, Section 10, Clause 2) and prayed the [fol. 66] Court to pass a decree declaring that the gross receipts tax assessed under the provisions of Maryland Code, Article 81, Sections 94½ to 99, inclusive, was unconstitutional and invalid as applied to the operating revenues of Canton derived from its import and export business, and for further relief.

10. On April 27, 1948, the Commission, pursuant to order of court, filed in said proceedings in the Circuit Court No. 2 of Baltimore City, a transcript of the record in the case before the Commission and upon Canton's said Petition and Appeal and said transcript of the proceedings before the Commission, a hearing was duly had before the Circuit

Court No. 2 of Baltimore City at which Canton appeared and was represented by counsel and at which the Commission appeared and was represented by the Attorney General and Deputy Attorney General of Maryland. No further testimony or evidence was offered by either party before the Circuit Court No. 2 of Baltimore City.

11. On June 24, 1949, the Circuit No. 2 of Baltimore City (Sherbow, J.) duly filed its written opinion, deciding that said final assessment made by the Commission against Canton for the year 1947 and the said gross receipts tax imposed by the Commission upon Canton for the year 1947 under Maryland Code, Article 81, Sections 94½ to 99, inclusive, were valid and, to the extent that said assessment included gross receipts derived by Canton from the transportation and handling of goods consigned for importation or destined for exportation, it did not contravene the Import-Export Clause of the Constitution of the United States (Article I, Section 10, Clause 2) and sustaining the decision of the Commission.

12. On June 29, 1949, the Circuit Court No. 2 of Baltimore City passed its order adjudging and decreeing "that the decision of the State Tax Commission of Maryland to include in the measurement of the petitioner's (Canton's) [fol. 67] gross receipts tax for the year 1947 receipts derived from the transportation of goods consigned for importation, or destined for exportation, be and the same is hereby sustained."

John Henry Lewin, J. Crossan Cooper, Venable, Baetjer and Howard, Attorneys for Canton Railroad Co. Hall Hammond, Attorney General of Maryland. Harrison L. Winter, Asst. Attorney General of Maryland. Attorneys for Joseph H. A. Rogan, et al. constituting the State Tax Commission of Maryland.

The foregoing statement of the case prepared pursuant to Rule 22 of the Rules of the Court of Appeals of Maryland respecting appeals is hereby approved.

J. L. Sherbow, Judge.

[fol. 68] 31 Op. Atty. Gen. 239

## Tax on Freight on Articles in Course of Exportation

Section 500 of the War Revenue Act of October 3, 1917 (40 Stat. 314), should be construed as not intended to cover freight on articles in course of exportation.

The question whether articles are in course of exportation does not depend upon the bill of lading or like formal matters, but upon the real substance and intent of the shipment.

Department of Justice, March 12, 1918.

Sir: I have the honor to acknowledge your letter of the 27th ultimo requesting my opinion on the proper construction of certain portions of section 500 of the War Revenue Act of October 3, 1917, 40 Stat. 300, 314.

That section, in so far as material to your inquiry, provides:

"There shall be levied, assessed, collected, and paid (a) a tax equivalent to three per centum of the amount paid for the transportation by rail or water * * * of property by freight consigned from one point in the United States to another; * * *."

Section 501 of the act provides:

"That the taxes imposed by section 500 shall be paid by the person, corporation, partnership, or association paying for the services of facilities rendered."

For the purpose of promulgating proper regulations for the assessment and collection of the taxes imposed by section 500, you make the following specific inquiries:

"1. In view of the provision of Article I, section 9 of the Constitution that 'no tax or duty shall be laid on articles exported from any State,' may the tax imposed by section 500 of the act be held to apply to the transportation of 'property by freight consigned from one point in the United [fol. 69] States to another' when that property is moving in the course of exportation?

"2. If the tax imposed by section 500 can not in view of the constitutional prohibition be held to apply to the transportation of property by freight consigned when such

property is moving in the course of exportation, what is the test as to whether or not such property is in the course of exportation? Is the test solely whether the property is moving upon a through bill of lading or other shipping document covering the exportation, or is it sufficient to establish its export character that the property is being moved for export, even though it is shipped upon a local bill of lading?"

1. The tax levied by section 500, *supra*, is directly upon the freight, that is, upon the price paid for the carriage of the goods, and the burden of it falls on the consignor or consignee. It is therefore without question a tax or duty on the transportation itself, and, looked at merely from the point of view of its incidence as a tax, it does not apparently differ, in its legal aspect, from a tax on the bill of lading, on the warehouse receipt, on the charter party, on the manifest, or on the policy of marine insurance, all of which have been held to be a tax on articles exported within the meaning of the Constitution (Fairbank v. U. S., 181 U. S. 283; N. Y. & Cuba Mail S. S. Co. v. U. S., 125 Fed. 320, 200 U. S. 488, 491; Selliger v. Kentucky, 213 U. S. 200, 207; U. S. v. Hvoslef, 237 U. S. 1; Thames and Mersey Marine Ins. Co. v. U. S., 237 U. S. 19). Indeed, insofar as the mere incidence of the tax is concerned, the matter seems to be settled by U. S. v. Hvoslef, *supra*, for the charter parties in that case were described by the Supreme Court as "in contemplation of law a mere contract of affreightment" (p. 16). In Thames and Mersey Ins. Co. v. U. S. *supra*, it is clearly implied on page 27 of the opinion that a tax on duty on freight would be a tax on the articles themselves.

In the cases cited above, the tax was directly upon transactions connected with the very act of exportation, while [fol. 70] in the present case the tax is laid only on the transportation within the United States. It cannot be regarded as a tax laid upon the shipments as exports or by reason or because of their exportation (Coe v. Errol, 116 U. S. 517, 525, 526). It is nevertheless, as stated above, a tax upon the act of transportation and not upon the goods as a part of the general mass of property within the United States, irrespective of their movement. In the case of U. S. v. Hvoslef, *supra*, the court said, p. 13:

"The prohibition relates only to exportation to foreign countries (Woodruff v. Parham, 8 Wall. 123; Dooley v.

United States, 183 U. S. 151, 154, 162), and is designed to give immunity from taxation to property that is in the actual course of such exportation (Pace v. Burgess, 92 U.S. 372; Turpin v. Burgess, 117 U. S. 504; Cornell v. Coyne, 192 U. S. 418). This constitutional freedom, however, plainly involves more than mere exemption from taxes or duties which are laid specifically upon the goods themselves. If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction, but in effect overriding it. It was the clear intent of the framers of the Constitution that 'the process of exporting the products of a State, the goods, chattels, and property of the people of the several States should not be obstructed or hindered by any burden of taxation.' Miller on the Constitution, p. 592."

The distinction between articles in the course of transportation to foreign countries and articles merely being manufactured, or warehoused, for exportation is justified by the decisions quoted by the Supreme Court of Pace v. Burgess, Turpin v. Burgess, and Cornell v. Coyne, as well as by the cases cited, infra, on the necessity of a through bill of lading. It is evident that a tax upon the freight on articles destined for export might cause a serious discrimination between inland States and those situated near the seaboard, and thus produce the very evil the Constitution intended to prevent.

[fol. 71] However, it is not necessary for present purposes to go further than to say that the power to levy a tax on the freight on articles moving in the course of transportation to foreign countries is so doubtful as to lead to the conclusion that Congress did not intend by section 500 to exercise it, but merely meant to cover property "consigned from one point in the United States to another," not in the course of exportation. (See U. S. v. Jin Fuey Moy, 241 U. S. 394, 401.)

2. It is now entirely settled that the question whether goods are in the course of transportation in interstate or foreign commerce does not depend upon the bill of lading or formal matters of that sort, but upon the real substance and intent of the shipment. (Texas & N. O. R. R. Co. v. Sabine Tram. Co., 227 U. S. 111; and cases cited; Louisiana

R. R. Comm. v. Tex. & Pac. Ry., 229 U.S. 336; So. Covington Ry. v. Covington, 235 U. S. 537, 545; Ill. Cent. R. R. v. Louisiana Railroad Commission, 236 U. S. 157, 163; Atchison & Topeka Ry. v. Harold, 241 U. S. 371, 375, 376). The case is different where the shipment is, in fact, "broken." (Gulf, Colorado & S. F. Ry. Co. v. Texas, 204 U. S. 403.)

My conclusion is that section 500 should be construed as not covering freight on articles in course of exportation, and that articles may be in course of exportation without a through bill of lading. I venture to suggest, however, that your regulations require strict proof of the fact that the shipment in question is really destined for export.

Respectfully yours, T. W. Gregory.

To The Secretary of The Treasury.

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[fol. 72] In Court of Appeals of Maryland, October Term, 1949

Nos. 76-96

Western Maryland Railway Co.

vs.

State Tax Commission of Maryland

Canton Railroad Co.

vs.

Joseph H. A. Rogan, et al., const. the State Tax Commission of Md.

Argued before Marbury, C. J., Delaplaine, Collins, Grason, Henderson and Markel, JJ.

Opinion by Collins, J.—Filed April 19, 1950

Delaplaine, J., and Markell, J., Dissent

[fol. 73] These appeals are taken by Western Maryland Railroad Company (Western Maryland) and Canton Railroad Company (Canton), from decrees of Circuit Court No. 2 of Baltimore City sustaining final assessment against the appellants made by the Maryland State Tax Commission

(the Commission) for gross receipts taxes imposed by Article 81, Section 95 of the 1943 Supplement of the Code.

In the case of Western Maryland the contested taxes for the years 1946 and 1947 are computed upon its gross receipts within the State of Maryland for the preceding calendar years of 1945 and 1946, respectively. In the case of Canton the contested taxes for the year 1947 were computed upon its "gross receipts for the calendar year 1946" within the State of Maryland. Both appellants claim that certain portions alleged to have been derived from their services rendered in "the importing and exporting process" should not have been included within the total amount of gross receipts subject to the tax. They claim that Article 1, Section 10, Clause 2, of the Constitution of the United States grants immunity to that portion of the gross receipts.

The pertinent provisions of Article 81, sections 94½ and 95, 1945 Supplement of the Code follow:

"94½. The phrases 'gross receipts,' 'total receipts,' 'gross earnings,' 'total earnings' and 'all earnings', as used in Sections 95 to 100, inclusive, mean in the case of railroads and other public service corporations, the operating revenues thereof, without any deductions or credits of any kind [fol. 74] whatsoever. When any public service corporation is engaged in more than one class of business and one or more classes thereof is business not subject to the gross receipts tax or subject thereto at different rates, the operating revenues of the class or classes of business subject to such tax at different rates shall be reported separately and taxed at the rate or rates applicable to such class or classes of business. This section shall not be construed as implying that in the absence of this section the requirements of Sections 95 to 100, inclusive, could properly be otherwise construed.

95. (a) A State tax as a franchise tax is hereby levied annually for the year 1930 and subsequent years measured by the gross receipts for the preceding calendar year, of:

(1) All domestic or foreign railroad companies, whose roads are worked by steam, doing business in this State, at the following rates, to wit:

One and one-quarter per centum on the first $1,000 per mile of gross earnings, or on the total earnings if they are less than $1,000 per mile; and

Two per centum on all gross earnings above $1,000 and up to $2,000 per mile; and

Two and one-half per centum on all earnings in excess of $2,000 per mile.

* * * * * * *

(b) If any such railroad company has part of its road in this state and part thereof in another State or States, such company shall return a statement of its gross receipts over its whole line of road, together with a statement of the whole length of its line and the length of its line in this State, and such company shall pay to the State, at the said rates hereinbefore prescribed upon such proportion of its gross earnings as the length of its line in this State bears to the whole length of its line; and similar statements shall be made by each oil pipe line company, and each sleeping car, parlor car, express or transportation company, telephone or telegraph or cable company, so that the proportion of the said gross earnings of the said companies, respectively, accruing, coming from their business within this State, may be accurately ascertained, or said statement may be made in any other mode satisfactory to and required by the State Tax Commission. The said gross receipts taxes shall be due and payable at the treasury on or before the first day of July in each year.

(c) Every partnership or individual engaged in any of [fol. 75] the above enumerated branches of business in this State shall be subject to the tax imposed by this section and comply with all provisions relating thereto as if such firm or individual were a corporation."

The so-called Import-Export clause of the Constitution of the United States, Article 1, Section 10, Clause 2, follows:

"No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress." See The Federalist, No. 42; 3 Elliot's Debates, 483; 14 U. of Chicago Law Review, 672.

The operating revenues claimed by the appellants to be exempt were received for transportation, switching, storage, crane privileges, wharfage and weighing of coal, grain, ores, and other miscellaneous commodities in transit between foreign ports and points within the United States. Appellant (Canton) claims that the tax in question is an occupation tax exacted for the privilege of engaging in the import-export process and therefore unconstitutional. This Court in a long line of cases has sustained the statutory declaration, supra, that the tax here in question is a franchise tax in lieu of all other State property taxes.

In the case of State v. Philadelphia, Wilmington, and Baltimore Railroad Company, 45 Md. 361, the Court had before it Chapter 234 of the Acts of 1872 which was the predecessor of the present Gross Receipts Tax. This Court said in that case at page 379 in holding the tax constitutional: "Properly speaking, the tax is not imposed upon the [fol. 76] gross receipts; they are referred to not as descriptive of the subject to be taxed, but merely as furnishing the basis of ascertaining the amount of tax to be paid. If then it is not a tax upon property, what is it? We say, it is a tax upon the *franchise* of railroad companies, measured by the extent of their business." At page 381 it was said: "Being of opinion, then, that the tax upon gross receipts of railroad companies, imposed by the Act of 1872, is a tax upon the franchise of such companies, and not upon their property, * * * we come to the question whether the defendant corporation is exempt from the payment of said tax?" State vs. B. & O. R. R. Co. 48 Md. 49 (1878); Cumberland vs. Pennsylvania R. R. Co. 92 Md. 668 (1901); State v. U. S. F. & G. Co. 93 Md. 314 (1901); State v. Central Trust Co., 106 Md. 268 (1907); Postal Telegraph Cable Co. vs. Harford County, 131 Md. 96 (1917); Rogan v. Baltimore & Ohio Railroad Co., 188 Md. 44 (1947); State Tax Commission v. Western Maryland Railway Co., 188 Md. 240, 246 (1947).

Western Maryland makes no contention that this is not an in lieu franchise tax. Canton to sustain its contention that the tax is an occupation tax and not an in lieu franchise tax cites Section 144 of Article 81 of the Code (1947 Supplement) which imposes a general franchise tax on corporations. Section 144(b) explicitly says that the tax is imposed "for its franchise to be a corporation." Sections 95, supra, and 144 supra, tax different kinds of franchises. The fran-

chise to operate a railroad is of course different from the [fol. 77] ordinary privileges conferred by a franchise to operate as a corporation.

Canton also contends that the tax here in question is not a franchise tax in lieu of property taxes because it is not proportionate in amount to the property taxes to which it would have been liable. Canton bases this argument on the fact that if the ordinary rate of State taxes is applied to the assessed value of its property for the calendar year 1946 its taxes would have been $3800.00 while its gross receipt taxes for that period amount to $39,092.00. Appellee points out in its brief that when Chapter 965 of the Acts of 1945, (substantially reenacted, except as to rates, by Chapter 677 of the Acts of 1947 and codified as Sections 7 (15), 25 (h), 94½ and 95 of Article 81, 1947, Supplement of the Code), is taken into consideration Canton's ad valorem property tax for the calendar year of 1946, as taxes on operating property, including land, would have been $40,681.00, an amount of $1000.00 "more than the amount of gross receipt taxes imposed for the gross receipts derived during that calendar year." Nashville C. & St. L. Ry. vs. Browning, 310 U. S. 362. Ohio River & W. R. Co. vs. Dittey, 232 U. S. 576.

Appellant (Canton) states in its brief: "If it were an original proposition, one might well argue that the phrase 'any Imposts or Duties on Imports or Exports' was intended to mean no more than property taxes on goods while they constitute imports or exports, or, at the most, taxes [fol. 78] in the nature of a tariff. The construction which the Supreme Court has placed upon these words through the years is to the contrary."

The in lieu franchise tax on apportioned gross income has been held valid under the Commerce Clause of the Constitution because it is not a direct tax on interstate business, not because the tax does not in the end increase the cost of interstate business. Such taxes are held valid because they are in lieu taxes and substitute for a property tax which is constitutional. Maine v. Grand Trunk Railroad Co., 142 U. S. 217, (1891); U. S. Express Co. v. Minnesota, 223 U. S. 335, (1912); Cudahy Packing Co. v. Minnesota, 246 U. S. 450, (1918); Northwestern Life Insurance Co. v. Wisconsin, 247 U. S. 132, (1918); Great Northern Railway Co. v. Minnesota, 278 U. S. 503, (1929); Illinois Central Railway Co. v. Minnesota, 309 U. S. 157, (1940); State

Tax Commission v. Western Maryland Railway Co., 188 Md. 240, supra.

An ad valorem property tax on tangible and intangible personal property both used in and derived from the process of importing and exporting is valid. W. P. & Cincinnati Transport Co. vs. Wheeling, 99 U.S. 273 (1879) Burke vs. Wells, 208 U. S. 14. If such an ad valorem tax is constitutional it certainly appears that a franchise tax in lieu of such direct ad valorem taxes is not barred by the Import-Export Clause. New York, ex rel. Parke, Davis & Co. vs. Roberts, 171 U. S. 658 (1898). People, ex rel. American Soda Fountain Co. vs. Roberts, 158 N. Y. 168 (1899).

[fol. 79] Both Canton and Western Maryland contend that this tax measured by the gross receipts for handling articles previously imported or to be exported and in "the importing and exporting process," is prohibited by the Import-Export Clause. Of course, a direct tax on imports and exports such as a license tax on the occupation of importing, a direct tax on sales of imports and exports, a tax on the actual doing of an import business, a direct tax on objects in process of importing or exporting, are constitutionally invalid under the Import-Export Clause. Brown vs. Maryland, 12 Wheat. 419, (1827); Crew Levick Co. vs. Pennsylvania, 245 U. S. 292; Anglo-Chilean Nitrate Sales Corp. vs. Alabama, 288 U. S. 218; Spalding & Bros. vs. Edwards, 262 U. S. 66; Hooven & Allison Co. v. Evatt, 324 U. S. 652.

The tax here in question is not a direct tax on imports or exports like that of a State stamp tax upon bills of lading for the export of gold and silver; or a federal stamp tax on an export bill of lading for wheat exported; or an ad valoreum tax on warehouse receipts issued on account of whiskey physically in a foreign country; or a federal stamp tax on charter parties exclusively for the carriage of cargoes from State ports to foreign countries; or a tax applied against contracts of marine insurance which were held to be an integral part of exportation. Almy vs. California, 65 U. S. 169, (1861); Fairbanks vs. United States, 181 U. S. 283, (1901); Selliger vs. Kentucky, 213 U. S. 200, (1909); United States vs. Hvoslef, 237 U. S. 1, (1915); Thames & Mersey Insurance Co. vs. United States, 237 U. S. 19, (1915).

[fol. 80] In W., P. & Cincinnati Transport Company vs. Wheeling, 98 U. S. 273, 25 L. Ed. 412 (1879), supra, the city of Wheeling imposed a personal property tax upon vessels in the amount of $.50 on each $100 of the assessed value

thereof. Those vessels were used in the import-export traffic. The tax was attacked. The Supreme Court in holding this tax valid and constitutional said in part: "Power to impose taxes for legitimate purposes resides in the States as well as in the United States; but the States cannot, without the consent of Congress, lay any duty of tonnage, nor can they levy any imposts or duties on imports or exports except what may be absolutely necessary for executing their inspection laws, as without the consent of Congress they are prohibited from exercising any such power. Outside of those prohibitions the power of the States extends to all objects within their sovereign power, except the means and instruments of the Federal Government. State Tonnage Tax Cases, 12 Wall., 204 (79 U. S., XX., 370)." One of the cases relied on by the Court in that opinion was the Maryland case of Howell vs. State, 3 Gill 14.

In New York ex rel. Burke vs. Wells, 208 U. S. 14, 52 L. Ed. 370 (1908), supra, the City of New York assessed for ad valorem personal property taxes, among other things, the cash on hand and notes owned by a foreign corporation doing business in New York State as importers, which were the proceeds of the sale of imported goods in the unbroken original packages. The Supreme Court of the United States held that those items could be taxed under [fol. 81] the New York law as capital employed in business within the State without infringing Article I, Section 10, of the Constitution of the United States, although most of the proceeds of such sales were remitted to the home office of the corporation in Ireland.

In New York, ex rel. Parke, Davis & Co. v. Roberts, 171 U. S. 658, 43 L. Ed. 323 (1896), supra, it was held that a franchise tax on the amount of the capital stock employed within the State by a foreign corporation conducting a strictly private business is not invalid because a part of its business consists of the importation and sale of articles in original packages. It was contended in that case that this tax was unconstitutional and invalid under the case of Brown v. Maryland, supra. In reply to that argument the Supreme Court of the United States said: "But that case is inapplicable. *Here no tax is sought to be imposed directly on imported articles or on their sale.* This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From

the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested." (Italics supplied here.) [fol. 82] As herein stated the contested taxes here are for the years 1946 and 1947. Evidently the appellants rely largely on decisions of the Supreme Court of the United States since and beginning in 1946. Great reliance is placed by appellants on the case of Richfield Oil Corporation vs. State Board, 329 U. S. 69 (1946). The majority opinion was written by Mr. Justice Douglas with Mr. Justice Black dissenting. In that case by statute California levied a retail sales tax on certain oil "measured by the gross receipts of retail sales and levied on retailers 'For the privilege of selling tangible personal property at retail' ". The Richfield Oil Corporation contracted with the government of New Zealand for the sale of Oil, f. o. b. Los Angeles. Payment was to be made in London. Delivery was made by Richfield by its own pipe lines from its refinery in Calfornia to storage tanks at the Los Angeles harbor and pumped directly from the storage tanks into a vessel owned by the New Zealand government, in the harbor of Los Angeles, and consigned to the Naval Officer-in-Charge at Auckland, New Zealand. No portion of the oil was used or consumed in the United States. The Supreme Court of the United States, reversing the California Supreme Court held that the oil became an export no later than when it was delivered into the vessel and when the passage of title by delivery of the oil into the vessel took place, the oil had become an export. This sales tax was [fol. 83] therefore a direct tax upon an export and violated the Import-Export Clause. This case was very similar to and naturally followed the decision in Crew Levick Co. vs. Pennsylvania, 245 U. S. 292, supra.

Joseph vs. Carter & Weakes Co. 330 U. S. 422 (1947), involved a New York State occupation tax upon stevedoring measured by gross receipts from servicing ships at the port of New York. The goods moved both in interstate and foreign commerce. The majority of the Supreme Court of the United States held that this tax violated the Commerce Clause of the Constitution but made no reference to the Import-Export Clause which was argued to the Court. The majority opinion was written by Mr. Justice Reed, concurred in by the Chief Justice, and Justices Frank-

furter, Jackson, and Burton. Mr. Justice Black dissented totally from the majority opinion. Justices Douglas, Rutledge, and Murphy dissented on the proposition that the Commerce Clause was violated. Justices Douglas and Rutledge dissented from the invalidity of the tax under the Commerce Clause but were of opinion that it was invalid under the Import-Export Clause. This dissenting opinion was based upon the cases of Thames and Mersey Ins. Co. vs. United States, 237 U. S. 19, supra; Spalding & Bros. vs. Edwards, 262 U. S. 66, supra; Richfield Oil Corp. vs. State Board, 329 U. S. 69, supra. The tax here before us is certainly not comparable under the Import-Export Clause to the following taxes before the Supreme Court in the last three cases cited: a tax applied against a contract of marine insurance which is an integral part of ex-
[fol. 84] portation and so vitally connected therewith that a tax on the insurance policies is essentially a tax upon the export; a tax upon baseballs sold by a manufacturer in New York to a firm in Venezuela, marked for delivery to the purchaser in Venezuela, and delivered to the carrier as directed by the purchaser; a sales tax upon oil as in the Richfield Oil case, supra.

Joy Oil Company vs. State Tax Commission 337 U. S. 286, (1949) involved a personal property ad valorem tax. The gasoline on which the tax was levied was transported from Grand Rapids to Detroit, Michigan, for export, where it was placed in storage tanks from which it was to be shipped by water to Canada. On account of the inability of the taxpayer to obtain shipping space, the gasoline, except for 50,000 gallons exported, remained in Detroit for about fifteen months. The majority of the Supreme Court of the United States held that while the gasoline was stored in Detroit it did not constitute an export because it might have been used for domestic purposes. Four Justices dissented on the ground that all of the facts indicated that the gasoline would be exported. The minority opinion therefore was based on the fact that this was a direct tax on an export and therefore a violation of the Import-Export Clause. Another case involving an invalid direct tax on articles in export is Empresa Siderurgica, S. A. vs. County of Merced, 337 U. S. 154, (1949). That case is not in point here.

[fol. 85] It is argued that the Import-Export Clause should be given a more prohibitive effect than the Commerce clause

because of the fact that the former contains an express tax exemption whereas the latter does not. Neither clause literally supports the interpretations that have been put upon them by unchallenged decisions. The Commerce clause has been extended by implication to prohibit state exactions regardless of Federal regulation, and the Import-Export clause has been extended to cover not only exactions upon the goods themselves but on the integral parts of exportation. The solution of the problem as to where the line should be drawn can hardly depend on verbalism. We find no case dealing with the precise question now presented. On principle, we see no reason why a franchise tax measured by gross receipts, including receipts from foreign commerce, should be valid under one clause and not under the other, particularly where the tax is in lieu of other permitted taxes.

Decrees affirmed, with costs.

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[fol. 86] In Court of Appeals of Maryland, October Term, 1949

Nos. 76-96

Western Maryland Railway Co.

vs.

State Tax Commission of Maryland

Canton Railroad Company

vs.

Joseph H. A. Rogan, et al., Const. the State Tax Comms. of Maryland

Argued before Marbury, C. J., Delaplaine, Collins, Grason, Henderson and Markell, JJ.

Dissenting Opinion by Markell, J. in Which Delaplaine, J. Concurs—Filed April 19, 1950

[fol. 87] On a federal question our duty is to follow the Supreme Court not to try to lead it. In the fourth Texas primary case, *Smith vs. Allwright*, 321 U. S. 649, 652, the

court remarked that the district court had denied relief and "the Circuit Court of Appeals quite properly affirmed its action on the authority of *Grovey v. Townsend*, 295 U. S. 45 [the third Texas primary case]." The court thereupon overruled *Grovey v. Townsend* and reversed the action "quite properly" taken by the lower court. We are not at liberty to guess about personalities, changes in personnel, or possible future changes in decisions, or to take the obscurantist attitude that determination of the present status of the authorities amounts to searching into the inscrutable and that we should therefore sustain the tax and let the Supreme Court strike it down if it will. As we have recently said, through Chief Judge Marbury, "If the Supreme Court did not mean what it said, or said more than it should, or what it should not have said, the responsibility is its and not ours." *Goetz v. Smith*. — Md. —, 62A 2d 602, 604. We may, and should, compare opinions of the court with dissenting opinions to determine the line of demarcation between them and the scope of the decisions of the court.

Cases under the Import-Export Clause are few in comparison with the multitude under the Commerce Clause. [fol. 88] For the first 150 years of the operation of the Constitution the Import-Export Clause, approximately but to a fluctuating degree, covered in the same way part of the same field as the Commerce Clause. Consequently in a case involving the broader field of the Commerce Clause it was seldom necessary to discuss the Import-Export Clause at all. In *Crew Levick Co. v. Commonwealth of Pennsylvania*, 245 U. S. 292, 295, in which the court held invalid a gross receipts tax on the business of selling goods in foreign commerce, it was said, "The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms." For the last ten years the field covered by the Import-Export Clause has, to an important extent, included taxes

not prohibited by the Commerce Clause. This important difference between the coverage of the two clauses is not due to changes in decisions under the Import-Export Clauses, with which we are here concerned, but to changes in decisions under the Commerce Clause with which for-
[fol. 89] tunately we are not concerned. With one exception (which will now be mentioned but is not now material) there has been from the first no change in the decisions under the Import-Export Clause. In *Brown v. Maryland*, 12 Wheat. 419, 449, (1827), it was "supposed" and in *Almy v. California*, 24 How. 169, (1861), it was assumed, as the basis of an unanimous opinion, that the Import-Export Clause is applicable to "imports" and "exports" from one state into another. In *Woodruff v. Parham*, 8 Wall. 123, (1869), these dicta were discarded and the clause held applicable only to imports from and exports to a foreign country.

On their face the Import-Export Clause and the Commerce Clause suggest two possible differences, (1) the Commerce Clause covers "commerce", the Import-Export Clause, "imports" and "exports", which conceivably might be construed as meaning only the goods imported or exported, not the business or process of importation or exportation, (2) the Commerce Clause does not contain any express tax exemption, the Import-Export Clause does. In *Brown v. Maryland, supra*, the first case under the Import-Export Clause, the first possible difference was negatived. That clause ever since has been construed as exempting from taxation not only the goods imported or exported, but the business and the process of importation or exportation. The second possible difference was never completely excluded, for about 150 years in a varying
[fol. 90] degree was almost elminated but in the last ten years has been definitely affirmed.

Until 1869 the Import-Export Clause was assumed to give an express tax exemption to transportation in foreign or interstate commerce. In 1873 there were decided the *State Freight Tax*, 15 Wall. 232, and the *State Tax on Railway Gross Receipts*, 15 Wall. 284, the former holding invalid a tax on freight, including interstate freight, at graduated rates per ton on different articles, the second sustaining a Pennsylvania tax on railway gross receipts, including receipts from interstate commerce. The opinions in both

cases were delivered by the same justice, but only four justices concurred in both decisions, which were essentially irreconcilable. After repeated subsequent decisions consistent with the *State Freight Tax*, the *State Tax on Railway Gross Receipts* was in effect overruled in *Philadelphia and Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326, (1887).

Thereafter until about ten years ago it was held that interstate commerce, and specifically gross receipts from such commerce, were exempt from state taxation, with one important but elusive exception, viz., a gross receipts tax, by whatever name called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor is not unconstitutional. *Maine v. Grand Trunk Railroad Co.*, 142 U. S. 217, (1891), as explained in *Postal Cable* [fol. 91] *Co. v. Adams*, 155 U. S. 688, (1895) and *Galveston, Harrisburg and San Antonio Railway Co. v. Texas*, 210 U. S. 217, 227, (1908). Such a permitted tax has been called a commutation tax (210 U. S. 226) and, by counsel in the instant case, an "in lieu" tax. For about ten years, beginning with *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, (1940), the court has narrowed the effect of the Commerce Clause as prohibiting taxes which burden interstate commerce. The court still holds that, "From the Commerce Clause itself, there comes * * * an abridgment of the state's power to tax within its territorial limits. This has arisen from long-continued judicial interpretation that, without congressional action, the words themselves of the Commerce Clause forbid undue interferences by the states with interstate commerce [4] and that this rule applies in full force to an unapportioned [5] tax on the gross receipts from interstate business [6], where the taxes were not in lieu of *ad valorem* taxes on property [7]. (Citing cases in footnotes 4, 5, 6 and 7.)" *Joseph v. Carter & Weakes Co.*, 330 U. S. 422, 427. In the case just quoted a state tax on the gross receipts of a stevedoring corporation from work on ships engaged in interstate and foreign commerce was held unconstitutional under the Commerce Clause. The statement quoted is appreciably narrower than it might have been before the *Berwind-White* case.

In *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 68, decided a few months before the *Joseph* case, the court indicated the change that had occurred in [fol. 92] the recent Commerce Clause cases, and, what is

more important and, I think, decisive in the instant case, the difference in this respect between the Commerce Clause and the Import-Export Clause. "* * * the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. It is well established that the Commerce Clause is a limitation upon the power of the States, even in absence of action by Congress. (Citing cases). But the scope of the limitation has been determined by the Court in an effort to maintain an area of trade free from state interference and at the same time to make interstate commerce pay its way. As recently stated in *McGoldrick v. Berwind-White Coal Mining Co., supra*, p. 48, the law under the Commerce Clause has been fashioned by the Court in an effort 'to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed.' That accommodation has been made by upholding taxes designed to make interstate commerce bear a fair share of the cost of the local government from which it receives benefits (see *e. g. Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 254-255, and cases cited; *McGoldrick v. Berwind-White Coal Mining., supra*) and by invalidating those which discriminate against interstate commerce, which impose a levy for the privilege of doing it, which place an [fol. 93] undue burden on it. (Citing cases)." After thus describing the somewhat tenuous line between taxes which are prohibited and those which are permitted under the Commerce Clause, the court then makes plain that there is no exception at all from the unqualified tax exemption under the Import-Export Clause.

"It seems clear that we cannot write any such qualification into the Import-Export Clause. It prohibits every State from laying 'any' tax on imports or exports without the consent of Congress. Only one exception is created—'except what may be absolutely necessary for executing its inspection Laws.' The fact of a single exception suggests that no other qualification of the absolute prohibition was intended. It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against 'any' tax a prohibition against 'any discriminatory' tax. As we shall see, the question as to what is exportation

is somewhat entwined with the question as to what is interstate commerce. But the two clauses, though complementary, serve different ends. And the limitations of one cannot be read into the other." 329 U. S. 75-76.

. . . . . .

"We cannot, therefore, read the prohibition against 'any' tax on exports as containing an implied qualification." 329 U. S. 78. In the *Richfield* case the court held unconstitutional under the Import-Export Clause applica- [fol. 94] tion of a California gross receipts sales tax to an export shipment.

As a decision under the Import-Export Clause the *Richfield* case is not qualified, but reaffirmed, by the *Joseph* case. In the *Joseph* case five justices broadened the invalidation of the tax to include interstate commerce as well as imports and exports, seven condemned it as to imports and exports. It is impossible to escape Professor Powell's interpretation of the opinions in this respect. 60 Harvard Law Review 744. Though the majority opinion does not mention the Import-Export Clause it cites the crew Levick case to the very page quoted, *supra*, where the court said the two questions were one. Reason and authority may be surveyed in vain without finding any ground for holding that a tax, invalid under the Commerce Clause, could be valid, as to imports or exports, under the Import-Export Clause.

A tax on gross receipts from carriage of goods is manifestly a tax on exportation. Transportation is not an incident, direct or indirect, of commerce or exportation. It *is* commerce and exportation. The Export Clause (as far as it goes) is identical in scope with the Import-Export Clause. In *Thames & Mersey Ins. Co. v. United States*, 237 U. S. 19, a stamp tax on marine insurance policies on exports was held unconstitutional. The court said, "The rise in rates for insurance as immediately affects exporting as an increase in freight rates, and the taxation of policies insuring cargoes during their transit to foreign ports is as much [fols. 95-104] a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. Such taxation does not deal with preliminaries, or with distinct or separable subjects; the tax falls upon the exporting process." 237 U. S. 27. The major premise, that a tax on freight is a tax on exports, was taken as axiomatic.

Under the Commerce Clause, since the recent cases and perhaps before, it may be that the Maryland gross receipts tax is constitutional as an "in lieu" tax. Canton, but not Western Maryland, disputes this proposition on the facts, but the fact question, I think, is not adequately presented on the record. So far as imports and exports are concerned, the question as to the Commerce Clause is immaterial. In the Import-Export Clause "the prohibition against 'any' tax on imports and exports contains no implied qualification." It matters not, therefore, what is the present scope or extent of the "in lieu" qualification or exception to the cases condemning gross receipts taxes under the Commerce Clause. Before the instant cases no question as to the constitutionality of the gross receipts tax under the Import-Export Clause has ever been raised.

I think the tax, as to imports and exports, is unconstitutional and the judgment should be reversed.

Judge Delaplaine authorizes me to say that he concurs in this opinion.

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[fol. 105] IN THE COURT OF APPEALS OF MARYLAND

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States pursuant to an appeal in the above-entitled case, and to include in said transcript of record the following papers, to wit:

1. The entire transcript on appeal to the Court of Appeals of Maryland from the Circuit Court No. 2 of Baltimore City consisting of

(a) Statement of the Case under Rule 22 of the Court of Appeals of Maryland respecting appeals, which was signed by the attorneys for the parties and approved by the Judge of the Circuit Court No. 2 of Baltimore City.

(b) Decree of the Circuit Court No. 2 of Baltimore City dated June 29, 1949.

[fol. 106] 2. Opinion and Decree of the Court of Appeals entered April 19, 1950, and the dissenting opinion.

3. Opinion of the Judge of the Circuit Court No. 2 of Baltimore City filed June 24, 1949.

4. Petition for Allowance of Appeal to the Supreme Court of the United States.

5. Assignment of Errors.

6. Judisdictional Statement.

7. Cost Bond for appeal and approval thereof.

8. Order Allowing Appeal.

9. Citation and Acknowledgment of Service thereof.

10. Notice of Service on appellees of Petition for Allowance of Appeal, Order Allowing Appeal, Assignment of Errors, Jurisdictional Statement, Notice as to Rule 12, paragraph 3 of the Revised Rules of the Supreme Court with Acknowledgment of Service thereof.

11. This Praecipe.

John Henry Lewin, Venable, Baetzer [not legible] & Howard, Attorneys for Canton Railroad Company, Appellant.

Service of the foregoing Praecipe and the receipt of a copy thereof are hereby acknowledged this 24th day of May, 1950, and it is hereby agreed that the matters set [fol. 107] forth in said Praecipe constitute the entire transcript of record on this appeal.

Hall Hammond, Attorney General; Harrison L. Winter, Assistant Attorney General, Attorneys for Appellees.

[fol. 108] Mandate

COURT OF APPEALS OF MARYLAND, OCTOBER TERM, 1949

No. 96

CANTON RAILROAD COMPANY

vs.

JOSEPH H. A. ROGAN, et al., const. State Tax Commission of Maryland

Appeal from the Circuit Court No. 2 of Baltimore City

Filed: September 14, 1949.

Oct. 3, 1949, Petition and Order filed granting permission to postpone No. 76 Oct. T., 1949 and hear jointly with No. 96 when No. 96 comes up for argument; appellee to file consolidated brief.

Apr. 19, 1950, Decrees affirmed with costs. (Nos. 76 & 96 combined.)

Opinion filed. Op. Collins, J.

Delaplaine, J. and Markell, J. dissent.

Markell, J. files dissenting opinion in which Delaplaine, J. concurs.

STATE OF MARYLAND, Set:

I, Maurice Ogle, Clerk of the Court of Appeals of Maryland, do hereby certify that the foregoing is truly taken from the record and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals, this nineteenth day of May A.D. 1950.

Maurice Ogle, Clerk of the Court of Appeals of Maryland. (Seal.)

Costs shown on this Mandate are to be settled between counsel and *Not Through This Office*.

[fol. 109] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 110] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION OF THE PARTS OF THE RECORD—Filed June 2, 1950

Pursuant to Rule 13, Par. 9, Appellant hereby adopts, as the statement of the points on which it intends to rely, the points set forth in its Assignment of Errors.

Appellant designates the entire record as filed as necessary for the consideration of the points relied on.

John Henry Lewin; Venable, Baetzer [not legible] & Howard, Attorneys for Appellant.

Service of the above Statement of Points and Designation of Parts of the Record, and receipt of a copy thereof, admitted this 1st day of June, 1950.

Hall Hammond, Attorney General; Harrison L. Winter, Assistant Attorney General, Attorneys for Appellees.

[fol. 110a] [File endorsement omitted.]

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[fol. 111] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—October 9, 1950

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Endorsed on Cover: File No. 54,602. Maryland, Court of Appeals, Term No. 96. Canton Railroad Company, Appellant, vs. Joseph H. A. Rogan, Owen E. Hitchens and William W. Travers, Constituting State Tax Commission of Maryland. Filed May 29, 1950. Term No. 96, O. T. 1950.